MASO DALOH & ANOR

v.

PP

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
KN SEGARA JCA
RAMLY ALI JCA
[CRIMINAL APPEAL NO: W-05-70-2008]
29 OCTOBER 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 34,942 grams of cannabis - Appeal by both accused against conviction and sentence to death - Defence of both accused - Whether a bare denial - Whether defence fabricated - Whether trial judge failed to evaluate available evidence properly - Benefit of doubt - Whether conviction unsafe*

CRIMINAL PROCEDURE: *Defence - Explanation by both accused - Appeal against conviction and sentence to death for trafficking in dangerous drugs - Whether defence a bare denial or fabricated - Whether trial judge failed to evaluate available evidence properly - Benefit of doubt - Whether conviction unsafe*

EVIDENCE: *Inference - Facts giving rise to more than one inference - Whether most favourable inference should then be accorded to accused*

This was an appeal by the appellants, the 1st and 2nd accused, against the decision of the High Court convicting them under s. 39B(1)(a) Dangerous Drugs Act 1952 ('DDA') for trafficking in 34,942 grams of cannabis and sentencing them to death under s. 39B(2) DDA. Both accused, who were Thai nationals, were arrested by the police in an ambush (at the Taman Tasik Titiwangsa car park), and several packages containing the cannabis were found in the car they had come in. Both accused raised the following defence: that they had travelled all the way from Narathiwat, Thailand as passengers seated at the back of the car, on the invitation of one Pak (as regards the 2nd accused) and on the invitation of the 2nd accused (as regards the 1st accused). Pak's friend, one Razak, also came together on the trip. Pak drove the car and Razak sat in the front passenger seat. Pak eventually stopped at Taman Tasik Titiwangsa and he and Razak told both accused, who had alighted from the car, to wait there while they went in search of a friend and the use of a public telephone. Pak

A and Razak went on foot leaving the car parked there, and both accused were arrested by the police while they were waiting there. Both accused contended that they were totally oblivious of the presence of the packages of cannabis in the car throughout the journey. The trial judge held that the defence was a bare denial and
B made a finding that Pak and Razak were mere fabrications.

Held (allowing the appeal, and setting aside the order of the High Court)
Per KN Segara JCA delivering the judgment of the court:

C **(1)** The trial judge failed to consider that the 1st accused was not in possession of any valid driving licence to corroborate the prosecution's case that the 1st accused was driving the car all the way from Narathiwat. There was no evidence that this car had been under surveillance from the time it left Thailand or
D from any other reasonable point of the journey from Thailand to Kuala Lumpur, that day. The trial judge did not evaluate carefully the 1st accused's evidence in cross-examination with the evidence of the prosecution (the evidence of C/I Mohd Ashril Md Johar ('SP3') in cross-examination) before rejecting
E the 1st accused's testimony that he was not the driver of the car. SP3 had agreed, in cross-examination, that he did not know who drove the car to the scene of the incident and that he did not know how many passengers were in the car at the time it arrived at the place of the incident. In the
F circumstances, the sworn testimony of the 1st and 2nd accused that the car was not driven by the 1st accused must be given considerable credence and, at the very least, had created a very serious doubt on the prosecution's case as to the identity of the
G driver of the car and the number of passengers in the car. (paras 21 & 24)

(2) Similarly, the evidence of the 1st and 2nd accused that there were two other persons, namely, Pak as the driver and Razak as a co-traveller seated in the front passenger seat, could not be
H dismissed as an afterthought, especially when there was evidence that: (i) two jackets were found on the driver's seat and were not established as belonging to the 1st or 2nd accused; (ii) the car's key was not recovered from the 1st or 2nd accused but found intact at the ignition switch; (iii) the registered owner of
I the car was neither the 1st nor the 2nd accused; and (iv) SP3 did not know how long the car had been in the vicinity of the car park before the police arrived and conducted observation for about 10 minutes before arresting both accused. (para 25)

(3) In the above circumstances, there could very well be some truth in the version of both accused that Pak and Razak had got out of the vehicle and left the scene, leaving both accused behind, after intimating their necessity to do what they did. The car could have arrived at the vicinity well before the police arrived to make their observation. Pak and Razak could have completely escaped the police's notice, bearing in mind that the incident took place in the late hours of the night. With the vicinity further shrouded in darkness by the shadows of the trees and shrubs, sightings could be elusive and deceptive. There was nothing improbable about Pak and Razak, and to label them as fictitious characters or mere fabrications to exculpate the 1st and 2nd accused from the charge was not an objective and unprejudiced finding, upon an examination of the recorded evidence and its proper evaluation. The trial judge did not apply his mind to the evidence produced with greater scrutiny than would ordinarily be required as the charge carried the mandatory death sentence upon conviction. (para 26)

(4) The trial judge misdirected himself in not giving the benefit of the doubt to both accused regarding the two jackets when there was no evidence adduced by the prosecution as to the whom the jackets belonged. It is trite law that in a criminal trial when a given set of facts give rise to more than one inference, the most favourable inference should then be accorded to the accused. (para 28)

(5) In the upshot, the conviction on the charge for trafficking under s. 39B(1) DDA was unsafe. (para 29)

[Both accused convicted of the offence of possession under s. 6 DDA, and sentenced to 15 years' imprisonment and 10 strokes of the rotan.]

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh perayu-perayu, tertuduh pertama dan kedua, terhadap keputusan Mahkamah Tinggi menyabitkan mereka di bawah s. 39B(1)(a) Akta Dadah Berbahaya ('ADB') kerana mengedar 34,942 gram dan mengenakan hukuman mati ke atas mereka di bawah s. 39B(2) ADB. Kedua-dua tertuduh, yang merupakan warganegara Thai, telah ditangkap oleh polis dalam suatu serbuan (di tempat letak kereta Taman Tasik Titiwangsa), dan beberapa pakej-pakej yang mengandungi kanabis telah dijumpai di dalam kereta yang mereka telah gunakan. Kedua-dua tertuduh membangkitkan pembelaan yang berikut: bahawa mereka telah

datang dari sejauh Narathiwat, Thailand sebagai penumpang yang duduk di belakang kereta, setelah dipelawa oleh seorang yang bernama Pak (berhubungan dengan tertuduh kedua) dan setelah dipelawa oleh tertuduh kedua (berhubungan dengan tertuduh pertama). Kawan Pak, seorang yang bernama Razak, juga menyertai perjalanan tersebut. Pak memandu kereta tersebut dan Razak duduk di tempat duduk penumpang depan. Pak akhirnya berhenti di Taman Tasik Titiwangsa dan beliau dan Razak memberitahu kedua-dua tertuduh, yang telah turun dari kereta, untuk menunggu di sana sementara mereka mencari seorang kawan dan talipon awam untuk digunakan. Pak dan Razak berjalan kaki dan membiarkan kereta terletak di sana, dan kedua-dua tertuduh telah ditangkap oleh polis semasa mereka sedang menunggu di sana. Kedua-dua tertuduh menghujah bahawa mereka langsung tidak tahu tentang kehadiran pakej-pakej kanabis dalam kereta sepanjang perjalanan. Hakim perbicaraan memutuskan bahawa pembelaan tersebut merupakan penafian kosong dan membuat dapatan bahawa Pak dan Razak adalah hanya rekaan.

Diputuskan (membenarkan rayuan, dan mengenepikan perintah Mahkamah Tinggi)
Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

(1) Hakim perbicaraan gagal menimbangkan bahawa tertuduh pertama tidak memiliki apa-apa lesen memandu yang sah untuk menyokong kes pendakwaan bahawa tertuduh pertama memandu kereta sepanjang perjalanan dari Narathiwat. Tidak ada keterangan bahawa kereta ini telah diawasi dari masa ia bertolak dari Thailand atau dari mana-mana masa perjalanan yang munasabah sepanjang perjalanan dari Thailand ke Kuala Lumpur, pada hari tersebut. Hakim perbicaraan tidak menimbangkan dengan teliti keterangan tertuduh pertama dalam pemeriksaan balas dengan keterangan pendakwaan (keterangan C/I Mohd Ashril Md Johar ('SP3') dalam pemeriksaan balas) sebelum menolak testimoni tertuduh pertama bahawa beliau bukan pemandu kereta. SP3 telah setuju, dalam pemeriksaan balas, bahawa beliau tidak tahu siapa yang memandu kereta ke tempat kejadian insiden dan bahawa beliau tidak tahu berapa ramai penumpang berada dalam kereta semasa ia tiba di tempat kejadian insiden. Dalam keadaan-keadaan, testimoni bersumpah tertuduh pertama dan kedua bahawa kereta itu tidak dipandu oleh tertuduh pertama mesti diberikan kredens mencukupi dan,

sekurang-kurangnya, telah mewujudkan keraguan yang amat serius atas kes pendakwaan mengenai indentiti pemandu kereta tersebut dan nombor penumpang dalam kereta tersebut.

(2) Begitu juga, keterangan tertuduh pertama dan kedua bahawa terdapat dua orang lain, iaitu, Pak sebagai pemandu dan Razak sebagai penumpang bersama yang duduk di tempat duduk penumpang depan, tidak boleh ditolak sebagai suatu yang difikirkan kemudian, terutamanya apabila terdapat keterangan bahawa: (i) dua jaket telah dijumpai di tempat duduk pemandu dan tidak dibuktikan berkepunyaan tertuduh pertama atau kedua: (ii) kunci kereta tidak diperolehi dari tertuduh pertama atau kedua tetapi dijumpai dalam keadaan baik di suis pencucuhan; (iii) pemilik berdaftar kereta bukan tertuduh pertama atau kedua; dan (iv) SP3 tidak tahu berapa lama kereta tersebut telah berada dalam tempat letak kereta sebelum polis tiba dan menjalankan pemerhatian selama 10 minit sebelum menangkap kedua-dua tertuduh.

(3) Dalam keadaan-keadaan di atas, ada kemungkinan terdapat kebenaran dalam versi kedua-dua tertuduh bahawa Pak dan Razak keluar dari kereta dan beredar dari tempat kejadian, meninggalkan kedua-dua tertuduh, selepas memberitahu keperluan mereka untuk buat apa yang mereka telah buat. Kereta tersbeut mungkin telah tiba di kawasan itu lama sebelum polis sampai untuk membuat pemerhatian mereka. Pak dan Razak mungkin telah melepasi perhatian polis, memandangkan bahawa insiden itu berlaku di lewat malam. Dengan kawasan itu lagi diselubungi dengan kegelapan oleh bayang-bayang pokok dan semak, penglihatan mungkin sukar dan boleh memperdayakan. Tidak ada apa-apa yang tidak mungkin mengenai Pak dan Razak, dan untuk mengatakan mereka adalah watak-watak ciptaan atau hanya rekaan untuk membebaskan tertuduh pertama dan kedua dari pertuduhan bukan suatu dapatan objektif dan tidak prejudis, atas pengkajian keterangan yang direkodkan dan pertimbangan betulnya. Hakim perbicaraan tidak menimbangkan keterangan yang dikemukakan dengan lebih teliti kalau dibandingkan dengan biasa kerana pertuduhan tersebut membawa hukuman mati mandatori jika disabit.

A **(4)** Hakim perbicaraan menyalaharahkan dirinya apabila tidak memberikan faedah keraguan kepada kedua-dua tertuduh berhubungan dengan dua jaket itu apabila tiada keterangan yang dikemukakan oleh pendakwaan tentang siapa yang memiliki mereka. Ia adalah undang-undang mantap bahawa dalam suatu
B perbicaraan jenayah apabila sesuatu set fakta-fakta membangkitkan lebih dari satu inferens, inferens yang paling sesuai sepatutnya diberi kepada tertuduh.

(5) Oleh yang demikian, sabitan atas pertuduhan mengedar di
C bawah s. 39B(1) ADB tidak sah.

[Kedua-dua tertuduh disabit atas pertuduhan milikan di bawah s. 6 ADB, dan dihukum 15 tahun pemenjaraan dan 10 pukulan rotan.]

Legislation referred to:
D Dangerous Drugs Act 1952, ss. 6, 39A(2), 39B(1), (2)

For the appellant - Gooi Soon Seng; M/s Naran Singh & Co
For the respondent - Mohamad Abazafree Mohamad Abbas DPP

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-53-2002]

E

[Editor's note: For the High Court judgment, please see PP v. Maso Daloh & Anor [2008] 1 LNS 271.]

Reported by Suresh Nathan

F

JUDGMENT

KN Segara JCA:

G **[1]** Maso Daloh (1st accused) and Romuelee Yakoh (2nd accused) were found guilty and convicted in the High Court Kuala Lumpur for the offence of trafficking in 34,942 grams of cannabis at the car park in Taman Tasik Titiwangsa on 20 February 2002 at 12.10am. They were sentenced to death under s. 39B(2) Dangerous
H Drugs Act 1952 (DDA).

[2] The 1st and 2nd accused are Thai nationals. The circumstances under which they were arrested are as follows.

[3] On 19 February 2002 at about 10pm C/I Mohd Ashril bin
I Md Johar (SP3) received information that trafficking in drugs was about to take place at Taman Tasik Titiwangsa, Kuala Lumpur. The information included the fact that the drugs were being

brought from Thailand in a Honda Civic car bearing Thai registration AB 556. He was given the information by his commanding officer and was instructed to lay an ambush. ("Pemberi maklumat adalah Pegawai Pemerintah saya. Dia yang memberi maklumat dan mengarahkan saya membuat serbuan.")

[4] Before taking off from Bukit Aman to accomplish his mission, SP3 briefed his team of six other police personnel, who were to participate in the ambush, that trafficking in ganja from Thailand will take place at the Taman Tasik Titiwangsa car park. ("Taklimat ialah berkenaan akan berlakunya satu pengedaran dadah jenis ganja dari Negara Thailand, yang akan dilakukan dikawasan tempat letak kereta, Taman Tasik Titiwangsa, Kuala Lumpur.")

[5] The police ambush party was split into two groups – one was led by SP3 and the other by C/Inspector Wan Azlan (SP6). They went to the vicinity of the target area in two police vehicles. Upon arrival at the scene at about 12.10am on 20 February 2002, both of the police vehicles were parked side by side on the road (at Y and Z on the sketch plan P9) leading to the parking area of the targeted vehicle (at X on P9).

[6] All the police personnel remained in their respective vehicles. SP3 made observation for about 10 minutes from inside his vehicle. He saw a red Honda Civic m/car bearing Thai registration AB 556 Narathiwat in the targeted location at the car park in Taman Tasik Titiwangsa. The distance between the parked police vehicles and the Honda Civic was about 30-50 meters. ("S: Berapakah jarak dari kedudukan awak didalam kereta, iaitu tempat bertanda Y dan Z didalam ID9, dengan kereta AB 556 yang berhenti di X? J: Lebih kurang 30 ke 50 meter.")

[7] During the 10 minutes observation SP3 saw two persons in the said car, one of whom was the driver and the other, a passenger seated next to the driver. The driver got out of the car and stood on the left side of the said car whereas the other person got out of the car and went to the back passengers' seat. He observed that this person was in the process of doing something at the back seat of the car. Thereupon, SP3 and SP6 proceeded towards the said car in their respective police vehicles. SP3 positioned his vehicle right in front of the car whereas SP6 positioned his vehicle on the right side of the said car.

[8] The person who was standing beside the car attempted to run away from the scene, but SP6 gave chase and arrested him. He was the 1st accused. SP3, on the other hand, arrested the person who was at the rear passenger seat. He was the 2nd accused.

[9] Thereafter, SP3 made a search of the car and found four plastic packages on the rear seat and 13 plastic packages at the rear passenger seat foot-well, immediately behind the driver's seat. He further recovered 17 more plastic packages from within the compartment immediately behind the back-rest of the rear seat and the boot of the car. The said 17 plastic packages were retrieved by SP3 through the speaker holes after the cover of the speakers were loosened using a screwdriver found in the car. All the 34 plastic packages were suspected to contain cannabis. The chemist (SP4) confirmed that the packages contained cannabis weighing a total of 34,942 grams.

[10] The defence of the accused can be summarized as follows.

[11] Both the 1st accused and 2nd accused live in Narathiwat, Thailand. They are friends. On 19 February 2002, at about 10am, the 2nd accused was in his house in Narathiwat when his friend, Pak, came to his house in m/car AB 556 (P24) and invited him to go to Kuala Lumpur (KL). Pak had a business matter to attend to in KL. ("Pak datang untuk ajak saya pergi ke Kuala Lumpur kerana dia ada urusan perniagaan di Kuala Lumpur. Selepas itu dia ajak bersiar-siar di Kuala Lumpur") Pak told him that another friend would also be coming together on the trip. When 2nd accused inquired from Pak whether he (2nd accused) could invite a friend to join them on this trip, Pak replied that he had no problem with that. Pak told 2nd accused to be ready to leave Narathiwat for KL at 11am.

[12] Pak then went away from 2nd accused's house. 2nd accused contacted 1st accused by telephone and invited him to join him on this trip to KL. The 1st accused accepted the 2nd accused's invitation. He arrived at 2nd accused's house at about 10.30am.

[13] The 1st and the 2nd accused waited for the arrival of Pak. At about 11am. Pak arrived, driving the same car (P24), with his friend, Razak, seated in the front passenger seat. The 1st and 2nd accused got into the rear passenger seat. They set off for KL with

Pak driving the car. Enroute, Pak stopped at the Sg. Buloh Toll Plaza for about an hour to have some food and rest. Then, from Sg. Buloh they proceeded on their journey, with Pak still driving the car, Razak seated in the front passenger seat, whilst 1st and 2nd accused sat at the rear passenger seat.

[14] Pak brought the car to a stop when they reached a place where there was a large lake. 1st and 2nd accused got out of the car. Pak and Razak told them to wait there while they went in search of a friend and the use of a public telephone. Pak and Razak went on foot leaving the car parked there.

[15] It was dark. The 1st accused smoked a cigarette whilst 2nd accused stood near some tree. Suddenly, they were attacked upon by several male persons wearing ordinary clothes. The attackers identified themselves as "Police" and alleged that the 1st and 2nd accused had brought drugs. They searched the car (P24) and retrieved several packages. 1st and 2nd accused were arrested and handcuffed.

[16] In short, the defence of the accused was that they had travelled all the way from Narathiwat in P24, as passengers seated at the back of the car. It was on the invitation of Pak (as regards 2nd accused) and on the invitation of 2nd accused (as regards the 1st accused). They had never been to KL before. They wanted to have fun in KL. They were totally oblivious of the presence of the packages in the car, throughout the journey.

[17] The learned trial judge formed the view that the defence of the accused was a bare denial. He made a finding that the existence of Pak and Razak was a fabrication.

[18] We are unanimous that the trial judge has misdirected himself, both in law and in fact, when he found that the defence was a bare denial. The trial judge failed to re-evaluate judiciously the evidence before him at the end of the trial to determine whether the prosecution has proved a case of trafficking, beyond a reasonable doubt, against the two accused.

On The Issue Of Whether The 1st Accused Was Seen Driving The Car P24 By SP3 And SP6 And Whether There Were Only Two Persons In The Car At All Material Times From Narathiwat In Thailand Till The Accused Were Arrested At The Car Park In Taman Tasik Titiwangsa, Just Shortly After Midnight Of 19 February 2002

[19] We have perused through the evidence adduced at the trial very carefully. We have excluded from consideration inadmissible evidence recorded by the trial judge, in particular, the information that drug trafficking will take place at the scene. We suspect the trial judge was prejudiced and biased by this information received by SP3 from his commanding officer, who was neither called as a witness by the prosecution nor offered as a witness to the defence.

[20] The sketch plan P9 does not show any street light at the car park. There are tall trees and shrubs in the vicinity. This can be seen in the photographs. The trees and shrubs could further darken the area and seriously affect general visibility of the area for anyone keeping observation of the targeted m/car from a distance of 30-50 meters away.

[21] We are of the view that the trial judge has failed to consider that the 1st accused was not in possession of any valid driving licence to corroborate the prosecution's case that the 1st accused was driving the car all the way from Narathiwat. There was no evidence that this car had been under surveillance from the time it left Thailand, the Sg. Buloh Toll Plaza or from any other reasonable point of the journey from Thailand to KL, that day. He did not evaluate carefully the evidence of the 1st accused in cross-examination with the evidence of the prosecution (SP3's evidence in cross-examination) before rejecting the 1st accused's testimony that he was not the driver of the car. SP3 had agreed, in cross-examination, that he did not know who drove the car to the scene of the incident and that he did not know how many passengers were in the car at the time it arrived at the place of the incident.

[22] The 1st accused testified:

> Saya tidak setuju saya dan OKT2 sahaja yang pergi ke tempat di mana kami ditangkap. Ada 2 orang lain.
>
> Saya tidak setuju bahawa saya yang memandu kereta itu dan OKT2 duduk di sebelah saya. Saya tak tahu kenapa saksi-saksi polis mengatakan saya yang memandu kereta itu ke tempat kejadian. Saya tiada lesen memandu.

[23] On the other hand SP3 testified under cross-examination: A

S: Rujuk P4A dan B kepada saksi. Adakah kamu setuju bahawa terdapat beberapa petak meletakkan kenderaan ditempat kejadian?

J: Ya, iaitu tempat meletak motosikal. B

S: Rujuk P4B kepada saksi. Kereta tersebut apabila sampai ditempat kejadian, diletakkan menghala ke mana?

J: Ke kanan gambar iaitu membelakangkan pokok-pokok yang terdapat dalam gambar.

C

S: Rujuk ID9 kepada saksi. Adakah kereta tersebut diletakkan di tempat bertanda H dalam ID9?

J: Kereta tersebut diletakkan di tempat bertanda K.

S: Berapakah jarak dari kedudukan awak di dalam kereta, iaitu tempat bertanda Y dan Z di dalam ID9, dengan kereta AB 556 yang berhenti di X? D

J: Lebih kurang 30 ke 50 meter.

S: Adakah kamu setuju bahawa jarak itu adalah agak jauh?

J: Setuju. E

S: Adakah kamu setuju bahawa waktu itu jam lebih kurang pukul 12.10 pagi?

J: Setuju.

S: Adakah kamu setuju bahawa tempat letak kereta tersebut dikelilingi oleh pokok-pokok? F

J: Setuju

S: Saya katakan kepada kamu bahawa tempat di mana kereta P24 diletakkan, adalah agak gelap? G

J: Saya tidak setuju.

S: Kenapa tidak setuju?

J: Semasa kereta itu diletakkan, ianya berdekatan dengan tiang lampu dan lampunya bernyala. H

S: ...

J: ...;.

S: Rujuk ID9 kepada saksi. Adakah tiang lampu tersebut dinyatakan di dalam rajah kasar ini? I

J: Tiada.

...

...

J: Saya dan anggota saya membuat pengawasan di tempat tersebut lebih kurang 10 minit sebelum membuat serbuan.

S: Rujuk ID9 kepada saksi. Dari arah manakah kereta P24, memasuki kawasan serang hendap?

J: Dari arah bertanda G dalam ID9.

S: Siapa sampai dulu?

J: Kereta P24 sampai terlebih dahulu daripada kami.

S: Adakah kamu tahu sudah berapa lama kereta P24 tersebut berada di situ sebelum kamu dan anggota kamu sampai?

J: Dari pemerhatian saya, lebih kurang 10 minit.

S: Adakah pemerhatian dilakukan ditempat lain, selain dari posisi Y dan Z di dalam ID9?

J: Tiada

S: Adakah kamu setuju bahawa apabila kamu sampai ke tempat kejadian, kereta P24 sudah ada di situ da kamu tidak tahu sejak bila kereta tu sampai di situ?

J: Setuju.

S: Saya katakan kepada kamu bahawa kamu tidak tahu siapa yang memandu kereta tersebut ke tempat kejadian, setuju atau tidak?

J: Setuju.

S: Saya katakan kepada kamu bahawa kamu tidak tahu berapa orang penumpang di dalam P24, semasa ianya sampai di tempat kejadian, setuju atau tidak?

J: Setuju.

S: Rujuk P19A dan B kepada saksi. Adakah kamu tahu siapa punya jeket-jeket ini?

J: Saya tidak tahu.

S: Adakah kamu setuju bahawa dengan terdapatnya dua jeket ini, kemungkinan terdapat dua orang penumpang lain dalam kereta tersebut?

J: Setuju.

[24] In the above circumstances, the sworn testimony of the 1st and 2nd accused that the car was not driven by the 1st accused must be given considerable credence, and, at the very least, has created a very serious doubt on the prosecution's case as to the identity of the driver of the car and the number of passengers in the car.

[25] Similarly, the evidence of the 1st and 2nd accused that there were two other persons, namely, Pak as driver and Razak as a co-traveller seated in the front passenger seat, cannot be dismissed as an after-thought. This is especially so when there was evidence that:

i) two jackets were found on the driver's seat and were not established as belonging to 1st or 2nd accused (see exh. P10 item 7&8 "Di jumpai didalam kereta ditempat duduk pemandu");

ii) the key of the car was not recovered from the person of the 1st or 2nd accused but found intact at the ignition switch (see exh. P10 item 9 "Dijumpai ditempat pemutar suis kereta");

iii) the registered owner of the car was neither the 1st nor the 2nd accused;

iv) SP3 did not know for how long the car had been in the vicinity of the car park before the police arrived and made observation for about 10 minutes prior to arresting both the accused.

[26] In the above circumstances, there could very well be some truth in the version of the accused that Pak and Razak had got out of the vehicle and left the scene, leaving both the accused behind, after intimating their necessity to do what they did. The car could have arrived at the vicinity well before the police arrived to make their observation. Pak and Razak could have completely escaped the notice of the police (SP3 and SP6), bearing in mind the incident took place in the late hours of the night. With the vicinity further shrouded in darkness by the shadows of the trees and shrubs, sightings could be elusive and deceptive. There is nothing improbable about Pak and Razak. In our view, to label them as fictitious characters, or a mere fabrication to exculpate 1st and 2nd accused from the charge, is not an objective and unprejudiced finding, upon an examination of the recorded evidence and its proper evaluation. We are unanimous that the trial judge has not applied his mind to the evidence produced with greater scrutiny than would ordinarily be required as the charge carried the mandatory death sentence upon conviction.

[27] We are of the view that upon a careful evaluation of the sworn testimony of both the accused and, the evidence adduced by the prosecution, no reasonable tribunal would have made the finding expressed by the trial judge in his grounds as follows:

> Pembelaan berhujah bahawa 2 jeket tersebut menguatkan atau menyokong versi pembelaan bahawa dua jeket tersebut kepunyaan Pak dan Razak. Saya menolak hujah ini. *2 jeket tersebut mungkin juga kepunyaan OKT1 dan 2. Saya tidak ragu-ragu memutuskan bahawa Pak dan Razak adalah rekaan pembelaan OKT1 dan 2.* Penafian (bare denial) adalah jelas tidak diterima oleh undang-undang … (emphasis added)

[28] The learned trial judge has misdirected himself in not giving the benefit of the doubt to the accused regarding the two jackets when there was no evidence adduced by the prosecution as to whom the jackets belonged. It is trite law that in a criminal trial when a given set of facts gives rise to more than one inference, then the most favourable inference should be accorded to the accused.

[29] In the upshot, we are unanimous the conviction on the charge for trafficking under s. 39B(1) DDA is unsafe. We accordingly allow this appeal and set aside the order of the High Court. We find both the appellants guilty of the offence of possession under s. 6 DDA punishable under s. 39A(2) DDA. Both the appellants are convicted and sentenced to 15 years imprisonment (from date of arrest) and ten strokes of the rotan.